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Property Law and Economics

EDITED BY
BOUDEWIJN BOUCKAERT

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1 Introduction

Boudewijn Bouckaert

Property Law and Economics is the fifth volume of the second edition of the Encyclopedia of Law and Economics series. The second edition continues the ambitions of the first edition which is to provide a reference work surveying most of the law and economics literature. The Encyclopedia allows the researcher to get efficiently acquainted with the literature on his research topic and look for publications of possible interest. Consulting the Encyclopedia puts the saying 'standing on the shoulders of the former generation' in practice and avoids duplicate efforts within the research community.

As with the first edition, the chapters of this volume contain two parts. First a review of the literature on the subject. The review is written by an authority in the field. On average the length of these reviews is 30 pages. Second, a quasi complete bibliography.

In the reviews the authors discuss the basic questions concerning the institutions involved, compare the legal solutions across different legal families (mainly common and civil law) and jurisdictions and provide an outline of the genesis of economic theories concerning the institutions within their focus. In Chapter 12 ('Security Interests, Creditors' Priorities, and Bankruptcy'), for instance, Bowers provides us with an outline of the evolution of the economics of bankruptcy law starting from the seminal insights of Jackson and the further directions the literature developed from Jackson's insights. The bibliography starts from the beginning of the law and economics literature and is updated until the end of 2007. Most listed publications are in English but as English is the 'lingua franca' of law and economics many publications, although in English, are of a non-Anglo-Saxon origin. For non-English publications a translation of the title is provided.

Concerning the quotation style the system prevailing in most economic literature was chosen. Within the text of the review the name of the author(s), the year of publication and eventually the page are mentioned while within the bibliographical list the full title of the book or article, the name of the journal, the volume number of the issue, the year of publication and the number of the first and last page are mentioned. Also the court cases, discussed within the reviews, are listed at the end of the bibliography.

Selection of entries and structure

Unlike the first edition in 2000 the volumes of the Encyclopedia are conceived as independent publications covering all the legal topics in one more or less delineated field of the law. Beside the chapters dealing with the law and economics literature on the different legal subjects, entries on the legal history of property rights and comparative property law were also added. The addition of the legal historian chapter allows the reader of this to put some legal subjects, mentioned in the law-and-economics-entries, in a historical perspective which may enrich the multi-disciplinary approach of his study. The addition of the comparative law chapter allows the reader, especially the reader without legal training, to place legal-technical problems, dealt with in the law-and-economics chapters, within the larger framework of the legal tradition. The legal historian and the comparative law chapters may also generate suggestions for further law-and-economics research. In the comparative law chapter (Chapter 3) for instance Van Erp and Akkermans mention several tendencies in modern property law, common to most national jurisdictions. They mention the indirect impacts of European law on property law, the dematerialization of property, the rise of party autonomy and the erosion of the *numerus clausus*-principle. These tendencies could be interesting subjects for further law-and-economic analysis.

As far as the selection of the topics of the chapters is concerned, some difficult choices had to be made. The borderline of property law with other branches of the law is often porous and unclear. This problem, existing in the legal tradition, reflects also on the subdivision of the legal-economic literature.

There are, however, legal chapters whose belonging to the domain of property law is beyond any discussion. On all these chapters a law-and-economics entry was written. These non-discussed property law-subjects are: private and common property rights (Elinor Ostrom and Charlotte Hess); original assignment of private property (Boudewijn Bouckaert); decomposition of property rights (Jeffrey Evans Stake); nuisance (Timothy Swanson and Andreas Kontoleon); adverse possession (Ben Depoorter); title systems and recordation of interests (Boudewijn Bouckaert).

Besides these 'classics' we included chapters on three other topics, the belonging to the domain of property law is not so evident at all, especially for classical lawyers.

Consider in the first place Chapter 10 on the economics of slavery, written by Jenny Wahl. Classical lawyers will classify this subject rather within the field of human rights than under property rights. This classification is of course largely influenced by the normative position law, and

especially international law, took on slavery by taking human personality as such out of the field of patrimonial rights and the sphere of commodification by the market. Property rights on human beings and the marketization of human beings were, however, historical realities in the Roman Empire, in Europe from the sixteenth to the eighteenth century and in the American South until 1865. As markets in human beings can be analyzed in the same way as markets in goods and services, the economics of slavery may generate insights into the phenomenon, a mere moral-philosophical approach cannot.

Chapter 11 on 'New forms of private property: property rights in environmental goods', written by Daniel Cole, deals mainly with environmental regulations, a subject classical lawyers would classify under the administrative law. As is shown in this chapter, the regulatory framework in this field evolved often towards a property approach, in which the administrative permits were considered as a kind of rights, in many respects similar to classical property rights. These permits can be traded and are considered as an asset, being part of the collateral of the holder. Consequently the inclusion of this chapter in a property volume is largely justified from an evolutionary point of view.

Chapter 12 on 'Security interests, creditors' priorities, and bankruptcy', written by James Bowers, covers at the contrary a set of rights classified, especially by civil lawyers, within the field of property law. Mortgages, pledges, liens and other contractual priority rights are considered to be 'dependant real rights' as they are dependant on a debt obligation of which they are a security. This is in contrast to the 'independent real rights', aiming at the organisation of an orderly use and transfer of corporeal goods. From a mere conceptual viewpoint these rights are indeed property rights as they have a holder, as there is a certain power of the holder on the concerned asset, as they are tradable and belong to the patrimony of the holder. From a mere functional analysis the classification within the field of property rights can be challenged however. The rationale of these rights is so closely connected with the functioning of credit markets and the functioning of corporations that inclusion into a volume on corporate law could be justified.

Finally there are also some subjects for which there are good reasons to include them into a volume on property rights but which were, also for some good reasons, not included. The subject of takings for instance has many links with property law as it deals with a way of acquisition of real property by the government. Most often classical lawyers will classify this subject under constitutional law (the general principles) and the administrative law (the technical details on the reasons for taking and its procedure). Both classifications are justified. As more elements in the law

on takings rather lean towards public law, an entry on taking will appear in the volume on public law. Also for zoning law there are arguments to include it in a property volume. Zoning law involves limitations on land use through a system of planning and permits. Most often these permits are tied to the land and as a consequence tradable. In this sense they follow the logic of the tradable permits, discussed within Chapter 11 by Daniel Cole. Also here, however, the administrative element seems to be the most important so that a chapter on zoning was not included. In so far as zoning law is related with more classical property rights, the subject is discussed in this volume, as for instance in Chapter 6 by Jeffrey Evans Stake, where zoning law is compared with other legal instruments to order land use like easements and restrictive covenants.

2 Property rights in legal history

Kim Hoofs

Introduction

Since time immemorial, the reach and the content of property rights change with society. These continual adjustments to the practical needs of society are concomitant to the purpose of these rights: serving society. The right of ownership is the most extensive and variable property right in the course of history. It has had many different meanings. These can only be understood by examining the particular society it served. The historical content of the right of ownership can be understood by studying codifications and statutes. These are important for the specific periods of history. The historical codifications often had major influences on later codifications and sometimes even on later civilizations.

In general, textbooks concerning the history of property law begin with Roman law, because of its major influence on modern private law of Western civilization. However, the ancient Egyptian and the ancient Greek cultures also had their influence on the Western legal systems. Greek civilization was greatly influenced by older civilizations, especially by Mesopotamian societies. The oldest code of law originates from this period of Mesopotamian dynasties and is known as the Code of Urukagina.

The two most famous and influential codifications of Roman law are the Lex Duodecim Tabularum (Law of the Twelve Tables) and the Corpus Iuris Civilis. Though the time difference between these codifications is over nine centuries, they resemble each other in several ways; contentwise as well as structurewise. The Lex Duodecim Tabularum became part of the cultural, historical consciousness of the Romans. This explains Gaius' excessive interest in the Lex Duodecim Tabularum during the first century A.D., which resulted in an extensive comment (Spruit, 2003, p. 8).

The Roman right of ownership, *dominium*, has been cultivated over the course of time, from indefinite to extensive. Because of the gradual development of the right of ownership one single definition will not satisfy. However, absoluteness can be mentioned as *the* fundamental characteristic of the right of ownership (Zwalve, 2000, p. 100). Although Roman law exerted a strong influence on Germanic law, the Germanic right of ownership kept its own substance and can, in contrast to the Roman right of ownership, be characterized as social, meaning that the reach of

the Germanic right of ownership was bordered by the rights of others (Dooyeweerd, 1957).

During the Middle Ages, the Corpus Iuris Civilis was of great importance to the explanation of the different ownership relations between vassals and lords, which existed under the feudal system. These relations were explained by referring to the *actio directum* and the *actio utile* to be found in the Corpus Iuris Civilis. The clarification of these different ownership relations was founded on the concept of divided ownership (Feenstra, 1989, pp. 111–122). The use of the concept of divided ownership ended abruptly, at least on the mainland of Europe, by the entry of the French Revolution. The main reason to bring an end to the concept of divided ownership was the uncertainty and inequality brought along by this concept of ownership. Seen in the light of the feudal system, divided ownership often led to infringement of personal and individual freedom. From that moment the principle of a uniform concept of ownership became a fact (Zwalve, 2003, p. 156; Van den Bergh, 1979, p. 29).

The English right of ownership went through a wholly different development. After the Conquest of England by William the Conqueror in 1066 the feudal system was established. As a result of the feudal system the concept of divided ownership was introduced (G. Smith, 1990, p. 46). In contrast to the history of ownership on the mainland of Europe, the concept of divided ownership in England survives to this day.

1. The Mesopotamian codes

The oldest codes by far originated from the Middle East, to be more specific from Mesopotamia, an area geographically located between the rivers Tigris and the Euphrates. These codes give an insight into the societies which they served and derived from.

The oldest code known is the Code of Urukagina of Lagash which dates from around 2350 B.C. This code has never been retrieved but its existence is known from later codifications by other Mesopotamian kings. This code dealt with the reformation of abuses by previous rulers. The oldest code that came down to us is the Code of Ur-Nammu and dates from 2100 B.C., containing sanctions in case of serious personal injuries. Both codes are not familiar with the idea of ownership.

The idea of ownership was first codified in the Code of Eshnunna, around 1930 B.C. The idea of ownership was already rooted in this society. A free person was able to own a variety of objects and was capable to protect, if necessary with the help of society, his right of ownership. The Code of Eshnunna was a compilation of legal rules, such as rules on the administration of the kingdom, classes and persons, marriage and divorce, misdemeanours, contract and property (Yaron, 1988).

Following after the appearance of the Code of Eshnunna, the Code of Hammurabi was created around 1760 B.C. and strongly influenced by the Eshnunna's Code. The Code of Hammurabi is the best-kept Mesopotamian code. The Eshnunnian idea of ownership was also incorporated in the Code of Hammurabi. This code was created with the idea to please the Gods and written to foster social justice, basically 'an eye for an eye'. The script is written on a basalt stone containing 282 legal provisions of various areas of law, as matrimonial law, law of slaves, law of women and law of children. The code also includes provisions with regard to theft, damages and property (Diamond, 2004, pp. 82–103; Yoffee, 2005, pp. 102–109)

2. A brief insight into property law during the ancient Egyptian and Greek periods

2.1 Ancient Egyptian law

In ancient Egyptian societies religious beliefs encroached in every aspect of society. This resulted in an inextricable amalgamation between religion and politics. In the area of law this amalgamation brought about a remarkable interaction between the different 'main characters of society'; the king and the goddess of law, Ma'at. The king was inferior to Ma'at and although the king was charged with creating legal rules, he could not be held responsible for them, only Ma'at. The major part of law concerned social customs and behaviour, and the rules of law were usually designed to protect families (David, 2000, p. 39).

Ancient Egyptian society was traditionally agricultural. Because of the limited fertile land, real property was extremely important. In the earliest history the king was an absolute monarch, with full powers over life, death, labour and property of all his subjects. He owned all real property.

Nevertheless, private law existed in practice, and property could be the object of private legal transactions. The land was treated as if it was privately owned by individuals themselves. They could own land, use the land as they chose, such as burning the land for fertility purposes, and were able to transfer the land. Thus, ancient Egyptian law did recognize the concept of private property.

Besides this concept of private ownership, the law also recognized a number of derivative concepts relating to property, such as bailment and servitudes (VerSteeg, 2002, p. 123; Theodorides, 1971, p. 299). The presence of these concepts is proof of a strong property law system.

2.2 Ancient Greek law

The ancient Greek property law can, just as the ancient Egyptian law, be characterised as a strong property law system. Ancient Greek law was also

influenced by religion, although in a different manner as in ancient Egypt (Parker, 2005, pp. 61–81).

Agriculture played a leading role in Greek society, which led to a very well-developed right of ownership regarding land (Isager and Skydsgaard, 1992, p. 3). The law drew a clear distinction between movable and immovable property. There were no restrictions to the ownership of movables in contrast with the ownership of immovable objects like land and houses. The latter was conserved for citizens. Citizens of foreign origin and foreigners were only able to own real estate when the right to acquire ownership was allocated to them. For real estate the obligation to record the transfer of ownership in a property register existed. Besides the privately owned estate, ancient Greek law knew also publicly owned estate and sacred real estate.

The owner of an object, movable or immovable, was able to use the object and sell it. Transferring partial enjoyment of the object was possible, as in the case of *misthosis* (lease). The owner was also entitled to offer the object as security. Ancient Greek law knew two types of security: personal and real security. Through personal security the person was pledging himself. By real security the object was offered as security. The oldest form of real security was *enechyron* (pawning). In the case of pawning the ownership passed to the creditor by selling the right to recovery to the creditor. The debtor retained possession of the object. When the debtor paid his debt to the creditor the property returned to him. If the debtor was unable to pay, the creditor retained ownership and had the right to possession (Maffi, 2005, pp. 259–263).

3. Developments of Roman society and law

3.1 The Roman political trilogy

Roman history traditionally discerns three main periods, each characterized by its own polity: the Monarchy, the Republic and the Principate. The beginning of the Monarchy is dated around 750 B.C. During this period the king was chosen for life by the people of Rome, the *comitia*. According to tradition, the rules of law were promulgated by the king in the quality of supreme priest. These rules are often indicated as *leges regiae*. However, these *leges regiae* cannot be considered as a result of considered legal politics.

With the fall of the Monarchy, in 510 B.C., the Republic was brought into being. The political power was taken by the Roman aristocracy, the Patricians, and divided between several officials, named *magistratus*. The assumption of the political power by the Patricians led to a conflict with the Plebeians, a prosperous part of the Roman population, who were not

assuming political powers. Not until 287 B.C. was this dispute settled by the Lex Hortensia, which put an end to the inequality of justice and legal insecurities (Spruit, 1994, p. 56; Spruit, 2003, p. 7).

In the atmosphere of the Republic the area of property law experienced an enormous growth. This growth is, to a certain extent, expressed in the Lex Duodecim Tabularum in 450 B.C. The Lex Duodecim Tabularum was the first codification in Roman law containing rules of private, public and procedural law. In spite of the incompleteness concerning the different rules and the lack of content, this codification has been of great importance. Even six centuries later an extensive comment on the Lex Duodecim Tabularum was written by Gaius (Hanenburg, 1972; Spruit, 2003, p. 15).

During the second part of the Republic polity, the Roman realm developed in a tearing rush. The territory of the Roman Republic was made of Western and Southern Europe, a part of Central Europe and Asia, Northern Africa and Egypt. This extension led to a social-economical and cultural development, which resulted in further civilization of private law.

At the start of the Principate in 27 B.C. the political powers were reunited in the hands of one man, Augustus, born as Octavianus, to restore the powers of state and the Republic establishments. The rules of Roman private law were spread out in an even bigger realm than during the Republic. Britannia and large pieces of the Middle East became part of the Roman realm. In this period the rules of private law became enlarged and refined. Many legal relations were controlled by the *bona fides* (good faith) whereby a concrete and just solution was placed in the hands of a judge, whom often was counselled by lawyers. Through this counselling the science of law flourished (Ankum, 1976, p. 3).

After a peaceful start the Principate became a very turbulent period. It brought on the division of the Roman empire into a West Roman and an East Roman empire, and in 476 A.D. the existence of the West Roman empire came to an end caused by an invasion of barbarian tribes.

The recapture of a part of the territory of the former West Roman empire by the East Roman emperor Justinian in 553 A.D. resulted in a renewed expansion of Roman law. Justinian was determined to systemize Roman law by creating a comprehensive Code. The Justinian Code, afterwards named the Corpus Iuris Civilis, became also valid in the recaptured areas. The West Roman territory was lost again in 568 A.D. and between the geographic borders of the formal West Roman empire the Corpus Iuris Civilis was lost sight of. The Corpus Iuris Civilis can be considered as the rounding off of the development of Roman law (Spruit, 2002, pp. 4–10).

3.2 Corpus Iuris Civilis

The Corpus Iuris Civilis was the first codification since the Lex Duodecim Tabularum which attempted to control all the different fields of law. The Corpus Iuris Civilis consisted of four parts; the *Codex Constitutionum*, the *Digesta*, the *Institutiones* and the *Novellae Constitutiones.*

The *Codex Constitutionum* contained a collection of imperial legislation of the Roman emperors. The *Digesta*, also named *Pandectae*, embraced a collection of legal writings containing private opinions from legal scholars such as Gaius, Ulpian and Papinian and was intended for practitioners and judges. The *Institutiones* were developed for a practical purpose, namely as a manual for students containing a general survey of the whole field of Roman law. The last part of the Corpus Iuris Civilis, the *Novellae Constitutiones*, was a compilation of later imperial legislation and added later (W. Smith, 1859, p. 302). The Corpus Iuris Civilis serves as one of the most revealing sources to gain an insight into Roman law.

3.3 Roman law

3.3.1 The actio *as the foundation of the Roman legal system* In modern legal systems, the foundation for legal actions is found in subjective rights. Roman law on the other hand was unfamiliar with a legal system of rights: the legal system was based on *actiones* (actions or writs). It is mainly a difference in legal technique. The Roman way to start a civil proceeding was by appealing on an *actio*. An *actio* in Roman law can be defined as a person's rights to make his right object of a legal dispute. The *actio* includes the right to an *actio* and the *actio* itself. By working with *actiones*, Roman law made postulated procedural law. The term *actio* was also used to indicate a lawsuit.

Roman law made a distinction between *actiones in rem*, real legal claims, and *actiones in personam*, personal legal claims. The difference between the *actiones* is laid down in the answer to the question whether there is a contract between the parties. If there is a contract, it is a matter of an *actio in personam*, otherwise it is a matter of an *actio in rem.*

This distinction between *actiones in rem* and *actiones in personam* is quite similar to, and has been the basis for, the distinction between absolute and relative rights in modern, European mainland law. An absolute right gives a legal status to the owner of the absolute right, meaning that the absolute right can be defended against everybody. These absolute rights can be created only in certain circumstances, in contrast to relative rights. The latter being only bipartite, they can be created in any circumstances. A relative right cannot be invoked against any person, but only against a specific person. In contrast to relative rights, the choice of absolute rights

is limited in two ways: there is a limitation of the number of absolute rights and the content of the absolute rights is largely dictated by law. This limitation is named *numerus clausus* (closed number). The distinction between absolute and relative rights is the foundation for the distinction between property law and contract law (Derine, 1982, pp. 117–118; Kaser and Knütel, 2003, pp. 46–7; Mousourakis, 2003, p. 130).

The Corpus Iuris Civilis made a distinction between physical and non-physical objects. A physical object, indicated as *res corporalis*, is an object that can be touched, such as land, slaves, garments, gold, silver and innumerable other goods. Non-physical objects, *res incorporales*, on the other hand, cannot be touched, such as real and personal rights and usufructs. Only a legal, separate, independent and physical object can be the subject of an *actio in rem* (Kaser and Wubbe, 1971, p. 93).

Certain specific objects did not come under a *res*, namely *res divini iuris*, *res communes omnium* and *res publicae*. *Res divini iuris* were objects belonging to the Gods, as sanctuaries. *Res communes omnium* (common things) sufficiently satisfied the needs of people, but should not be a subject of power, like the air. *Res publicae* (public things) were objects owned by 'the people'. These objects could be used by all people of a state, like public roads and harbours (Kaser and Knütel, 2003, pp. 119–120; Van der Steur, 2003, p. 111).

Another object-distinction made by the Corpus Iuris Civilis could be found in *res mancipi* and *res nec mancipi*. *Res mancipi* were those objects which the Romans most highly praised, as Italian soil, rural servitudes and slaves. A slave was not considered to be a person, but a thing. All other objects were *res nec mancipi*. This distinction was very important when it concerned a proper transfer of an object. A *res mancipi* was transferred through *mancipatio*, containing formal acts. The *mancipatio* had a restricted appropriateness; just Roman citizens could transfer and receive objects by *mancipatio*. Transferring a *res nec mancipi* occurred by merely transferring the possession of the object (Kaser and Knütel, 2003, pp. 119–120; Potjewijd, 1998, p. 12; Spruit, 2003, p. 179).

3.3.2 The complicated content of dominium The most important *actio in rem* according to Roman law is the *rei vindicatio*. The purpose of this legal claim was to protect ownership. During the Monarchy and the Republic, ownership was called *meum esse* (it is mine). The reach of the *meum esse* was not clear, which led to a vague boundary line between ownership and possession. As a result of the juridical development during the Republic, the extensive meaning of ownership was restructured in a more defined concept. Around the start of the first century A.D., ownership was named *dominium* and a distinction made between *dominium* and *possessio*

on the one hand, and *dominium* and limited real rights on the other hand (Kaser and Knütel, 2003, pp. 138–139; Mäkinen, 2001, pp. 11–15).

Although no definition of *dominium* was found in the Roman law, certain characteristics were given, such as the absoluteness of the *dominium*. Absoluteness contained the independence of ownership relating to other 'rights' and the absolute power of the owner to dispose of the object (Zwalve, 2000, p. 100). The absoluteness of *dominium* can be found in two *actiones*, offered to the owner when experiencing interference of his property. The first *actio* is the already mentioned *rei vindicatio*, which made it possible to claim movable goods or land from any possessor. The second *actio* is the *actio negatoria* that made it possible to sue any person who was interfering in the control of the property. Both *actiones* could be initiated against any possible possessor (Bouckaert, 1990, p. 782).

Until the fall of the West Roman empire several forms of ownership existed. First of all, Quiritarian ownership acquired under the *ius civile Quiritium* (civil law), the original Roman legal system. Besides quiritarian ownership there was praetorian ownership, which was extended by the *ius naturale* (natural law). Natural law consists of rules, which are common to all peoples, and are based upon objective and eternal norms. Praetorian ownership would only come into being when strict appliance of general rules would lead to an unreasonable outcome. In these cases praetorian ownership took precedence over civilian ownership. Even though the term ownership is used, the core praetorian ownership is not equal to quiritarian ownership. Actually, praetorian ownership should not be seen as ownership, but only as an absolute, exclusive right.

The praetor could allow praetorian ownership in two situations. First, when the possession of the object was provided by a person who was not appropriate to dispose of the object and second, when the acquisition of the possession of the object, a *res mancipi*, was not recognized by the *ius civile*. In the second situation the person did not become owner of the object, but merely possessor because the formal acts for transferring the object were not fulfilled. In that case the term 'praetorian ownership' was often replaced by the term 'bonitarian ownership'.

Roman law knew, besides the praetorian ownership and the bonitarian ownership, two other kinds of ownership, namely ownership attributed to foreigners and ownership concerning immovables in the province. The above mentioned different forms of ownership were merged by the Corpus Iuris Civilis into one form of ownership, which excluded ownership where the possession of the property of the object was provided by a person who was not permitted to dispose of the object (Ankum, 1976, p. 39; Kaser and Knütel, 2003, pp. 139–140).